

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIO-CESAR GOMEZ-PEREZ,

Defendant-Appellant.

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UNPUBLISHED

March 17, 2015

No. 319745

Oakland Circuit Court

LC No. 2009-229142-FH

Before: DONOFRIO, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

Defendant pleaded no contest to delivering or manufacturing 450 or more but less than 1,000 grams of cocaine, MCL 333.7401(2)(a)(ii), two counts of delivery of 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), and delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced defendant to concurrent prison terms of 15 to 30 years for the conviction involving delivery of between 450 and 1,000 grams of cocaine, and 135 months to 20 years for each of the remaining convictions. This Court granted defendant's application for leave to appeal, "limited to the issue relating to *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010)." *People v Gomez-Perez*, unpublished order of the Court of Appeals, entered February 7, 2014 (Docket No. 319745). This Court's order granting leave also remanded this case to the trial court for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1993), to determine whether defense counsel was ineffective for failing to advise defendant of the immigration consequences of his plea. On remand, the trial court decided this issue adversely to defendant. For the reasons provided below, we affirm.

Defendant, a 34-year-old illegal immigrant living in the United States, pleaded no contest to four charges involving delivery of cocaine. Defendant argues that defense counsel was ineffective for failing to advise him of the deportation consequences of his no contest pleas. Following a *Ginther* hearing, the trial court found that defense counsel "advised defendant that his plea to four counts of delivery of cocaine would result in deportation," and accordingly, rejected defendant's claim that he was denied the effective assistance of counsel.

A claim alleging ineffective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Russell*, 297 Mich App 707, 715; 825 NW2d 623 (2012). Questions of law are reviewed de novo, and a trial court's

findings of fact are reviewed for clear error. *LeBlanc*, 465 Mich at 579. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). As when challenging counsel's performance at trial, a defendant claiming ineffective assistance of counsel in connection with a plea proceeding must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014). The defendant has the burden of establishing the factual predicate of his ineffective assistance claim. *Id.*

Criminal defendants have a right under the United States and Michigan constitutions to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). That right extends to the plea bargaining process, *Lafler v Cooper*, \_\_\_ US \_\_\_; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012), and an ineffective assistance claim may be based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer, *Douglas*, 496 Mich 594. To that end, counsel must inform his immigrant client "whether his plea carries a risk of deportation" to satisfy the Sixth Amendment right to the effective assistance of counsel. *Padilla*, 559 US at 374.

At the *Ginther* hearing, defense counsel testified that he was aware of the *Padilla* case and of his obligation to inform defendant that a plea carried a risk of deportation. Counsel stated that he discussed defendant's status as a non-citizen of the United States and the deportation issue with defendant, although that fact was not placed on the record at the plea hearing. When asked if he advised defendant that, as an immigrant, a conviction resulting from a plea or trial could result in deportation, counsel replied, "Yes, we had that conversation." Counsel explained that the deportation discussion was not placed on the record at the plea hearing because they were focused on the length of defendant's prison terms. Defense counsel reiterated that they "discussed the deportation issue," and testified that he was "confident" that defendant "was aware of it." In contrast, defendant denied that defense counsel ever mentioned the risk of deportation if he pleaded no contest, stating that counsel "never mentioned any of that to me."

The trial court determined that portions of defendant's testimony were "entirely unbelievable and not worthy of serious consideration," whereas defense counsel's testimony was "fully credible" and "truthful" and entitled to "considerable weight." The trial court observed that defendant's testimony at the evidentiary hearing that he did not understand the proceedings was refuted by the record of the plea hearing and sentencing. The trial court stated that "to the extent that there was a conflict between [defense counsel's] testimony and defendant's testimony, this Court resolved it in favor of [defense counsel]." The court expressly found that defense counsel "advised defendant that his plea to four counts of delivery of cocaine would result in deportation." This Court gives deference to a trial court's superior ability to judge the credibility of witnesses who appeared before it. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Consequently, in light of the record, and affording deference to the trial court's superior ability to evaluate credibility, we find no clear error in the trial court's finding that defense counsel advised defendant that the plea carried a risk of deportation. Thus, defendant's claim of ineffective assistance must fail because he has not established the necessary factual predicate for his claim.

Moreover, *Padilla* does not support defendant's position. *Padilla* only requires an attorney to warn a client if "*his plea* carries a risk of deportation." *Padilla*, 559 US at 374 (emphasis added). In *Padilla*, the defendant was a legal permanent resident of the United States for 40 years, who was only subject to deportation *because* of his guilty plea for trafficking large amounts of marijuana. *Id.* at 359, 360. In the present case, defendant was an illegal immigrant subject to deportation regardless of how his criminal case resolved. In other words, defendant was subject to deportation whether he pleaded no contest or proceeded to trial and was either acquitted or convicted. Thus, even if defense counsel had failed to warn defendant about any risk of being deported, defendant cannot establish any prejudice. See *United States v Sinclair*, 409 Fed Appx 674, 675 (CA 4, 2011) (noting that the substantial rights of the defendant, an illegal alien, were not affected because "his guilty plea had no bearing on his deportability").

Affirmed.

/s/ Pat M. Donofrio  
/s/ Michael J. Riordan  
/s/ Michael F. Gadola